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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1721~~ 70-179

JESSE S. LOMBARDINO,

Petitioner,

—v.—

LOUIS A. HEYD, JR., Criminal Sheriff,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JESSE S. LOMBARDINO,

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—v.—

LOUIS A. HEYD, JR., Criminal Sheriff,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on February 17, 1971.

Citation to Opinions Below

The opinion of the United States District Court for the Eastern District of Louisiana is reported at 318 F. Supp. 648 and is set forth in the Appendix, *infra* at pp. 13-21. The *per curiam* decision of the United States Court of Appeals for the Fifth Circuit is unreported; it is set forth in the Appendix, *infra* at pp. 22-23.

Jurisdiction

The judgment of the United States Court of Appeals was entered on February 17, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

Question Presented

Whether evidence seized in violation of the Fourth Amendment is admissible in a probation revocation proceeding?

Statement of the Case

This petition seeks to review the denial of habeas corpus relief in the courts below. The essential facts are simple and undisputed. They are set forth in the District Court opinion as follows.

On February 16, 1970, [the petitioner] Lombardino was convicted in state court of two counts of attempted simple burglary following the entry of pleas of guilty. He was sentenced to serve eighteen months on each count, the sentences to run concurrently. Execution of the sentences was suspended and petitioner was placed on active probation for a period of three years. As one of the conditions of his probation, petitioner agreed to

> "Refrain from the violation of any law of Louisiana, or of any other State, or of the District of Columbia, or of the United States; and to refrain from the violation of any Ordinance of any political subdivision of the State of Louisiana . . ."

On March 8, 1970, Lombardino was stopped and frisked without a warrant by a policeman who had been an arresting officer on petitioner's burglary charge. The officer had neither reasonable grounds for suspicion that Lombardino was armed nor probable cause for arrest. In the search of petitioner's person, the officer found a tin of marijuana. A hearing on a motion to suppress was held on April 20, 1970, and the marijuana was ordered suppressed when the judge determined that the search had been made in violation of petitioner's constitutional rights. The charge of possession of marijuana was subsequently dropped by the state.

While the possession charge was still pending, however, the Probation and Parole Division of the Louisiana Department of Corrections placed a detainer against Lombardino for violation of his probation. Petitioner has since been held in Orleans Parish Prison.

Pursuant to Article 900, Louisiana Code of Criminal Procedure, a hearing was conducted on June 2, 1970, to determine whether Lombardino had violated the conditions of his probation. The state judge presiding at the revocation hearing was the same one who had placed petitioner on probation and who had suppressed the marijuana in connection with the possession charge. After hearing the probation officer's testimony that Lombardino had been found in possession of marijuana, the judge concluded that petitioner had violated a condition of his probation and ordered the probation revoked. App., *infra*, pp. 14-15.

Having exhausted state remedies, petitioner filed the instant habeas corpus application in the United States District Court for the Eastern District of Louisiana (Cassibry,

D.J.). Judge Cassibry agreed that persons on probation are entitled to "protection from illegal searches", App., *infra*, p. 16, but held that such protection did not encompass probation revocation proceedings. Accordingly, the petition was denied.

The Court of Appeals without oral argument or opinion affirmed the judgment of the District Court. It is to review that decision that petitioner seeks a writ of certiorari.[1]

Reasons for Granting the Writ

The decisions below, holding that the Fourth Amendment exclusionary rule is inapplicable to probation revocation proceedings, conflict with the principles of the Fourth Amendment and this Court's teachings that a person cannot be deprived of his liberty on the basis of unconstitutionally obtained evidence.

The scope of the Fourth Amendment's protection was set forth by Mr. Justice Holmes half a century ago:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392 (1920).

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[1] Within the past few weeks, the petitioner was released from prison on parole. Since he was incarcerated when the petition was initially filed and since various consequences flow from the revocation of probation, the issues tendered to this Court are not moot. See *Sibron* v. *New York*, 392 U.S. 40 (1968); *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); *Hahn* v. *Burke*, 430 F.2d 100, 102-03 (7th Cir. 1970); *cert. denied*, 39 U.S. Law Week 3471 ((1971) (revocation of probation); *Howett* v. *State of North Carolina*, 415 F.2d 1316, 1320-22 (4th Cir. 1969) (revocation of probation).

And of course a decade ago this exclusionary rule, which had obtained in federal courts since *Weeks* v. *United States*, 232 U.S. 383 (1914), was held to be "an essential part of both the Fourth and Fourteenth Amendments . . ." so that evidence obtained by unconstitutional searches and seizures is "inadmissible in a state court". *Mapp* v. *Ohio*, 367 U.S. 643, 655, 657 (1961).

While the primary application of the Fourth Amendment and its exclusionary rule has been in the context of criminal trials, it has not been limited to such proceedings. This Court has held the exclusionary rule applicable in a quasi-criminal civil forfeiture proceeding where the "object, like a criminal proceeding, is to penalize for the commission of an offense against the law". *One 1958 Plymouth Sedan* v. *Commonwealth of Pennsylvania*, 380 U.S. 693, 700 (1965). Other courts have applied it in similar situations. See, *Pizzarello* v. *United States*, 408 F. 2d 579, 585-86 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969) (tax assessment case); *Knoll Associates, Inc.* v. *FTC*, 397 F. 2d 530 (7th Cir. 1968) (administrative proceedings); *Powell* v. *Zuckert*, 366 F. 2d 634 (D.C. Cir. 1966) (employee discharge proceedings); *In Re March*, 40 Ill. 2d 53, 55, 237 N.E. 2d 529, 531 (1968) (juvenile proceedings).

The reasoning in *One 1958 Plymouth Sedan, supra* is applicable here,

> It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible. 380 U.S. at 701.

Yet that is precisely what the courts below held: the illegally seized evidence, though excludable in the criminal proceeding, was held admissible in the probation revocation proceeding "requiring the determination that the criminal law has been violated". In effect, they ruled that the Fourth Amendment provides greater protection to a man's interest in his automobile than in his liberty. Yet, analytically, there is no distinction between the subsequent probation revocation hearing and the subsequent forfeiture hearing—both sought to prove a violation of law identical to the underlying charge, both were premised on evidence illegally obtained, and both should properly be subject to the exclusionary rule.

The failure of the courts below to afford petitioner the same constitutional protection as a car was premised on two decisions which held that the Fourth Amendment exclusionary rule does not apply to *parole* revocation proceedings, *United States ex rel. Sperling* v. *Fitzpatrick,* 426 F. 2d 1161 (2d Cir. 1970) and *In Re Martinez,* 83 Cal. Rptr. 382, 463 P. 2d 734 (1970). However, both decisions, as well as several others, have recognized that parolees or probationers are entitled to the protection of the Fourth Amendment when the evidentiary fruits of an invasion of their privacy are introduced in a criminal prosecution. See, *Smith* v. *Rhay,* 419 F. 2d 160 (9th Cir. 1969); *United States* v. *Hallman,* 365 F. 2d 289 (3rd Cir. 1966); *Brown* v. *Kearney,* 355 F. 2d 199 (5th Cir. 1966); *Martin* v. *United States,* 183 F. 2d 436 (4th Cir. 1950); *United States* v. *Lewis,* 274 F. Supp. 184 (S.D.N.Y. 1967).

The *Martinez* decision balanced what the majority perceived to be a "slight" incremental deterrence which would flow from application of the exclusionary rule against the

ill "social consequences" of such an application. But as Justice Peters' perceptive dissent noted, the only adverse social consequences which were identified were the same as those which obtain under the regime of *Mapp* v. *Ohio*, namely, the occasional freeing of persons who would otherwise be imprisoned. 463 P. 2d at 743-44. In *Sperling*, the court emphasized that the federal parolee was in constructive custody, that the purpose of the parole revocation hearing is rehabilitative, and that inadequate manpower requires that federal parole officers rely on state and local police to ferret out parole violations. The premises of the *Sperling* decision have been carefully criticized. See, *Note*, 45 N.Y.U.L. Rev. 1111 (1970). Both *Martinez* and *Sperling* are in conflict with the reasoning, if not the specific holding, of *Silverthorne Lumber Co.* and *One 1958 Plymouth Automobile*.

Moreover, there are distinctions between the revocation of parole and the revocation of probation which afford the probationer a more legitimate claim to constitutional protection. See *United States ex rel. Randazzo* v. *Follette*, 282 F. Supp. 10, 13 (S.D.N.Y. 1968) (dictum), *aff'd*, 418 F. 2d 1319 (2d Cir. 1969); Holtzoff, *The Power of Probation and Parole Officers to Search and Seize*, 31 Fed. Prob. 4-7 (No. 4, 1967). If anything, a probation revocation proceeding is more analogous to the initial sentencing proceeding than to a parole revocation hearing. And in *Mempa* v. *Rhay*, 389 U.S. 128 (1967) this Court held that the right to counsel applies to sentencing proceedings which result in the revocation of probation.

The question of whether the Fourth Amendment exclusionary rule applies to sentencing proceedings was considered in *Verdugo* v. *United States*, 402 F. 2d 599 (9th

Cir. 1968). The Ninth Circuit, after analyzing the purposes of the exclusionary rule, held that it prohibited the inclusion of illegally seized evidence in a presentence report,

> We conclude that where, as here, the use of illegally seized evidence at sentencing would provide a substantial incentive for unconstitutional searches and seizures, that evidence should be disregarded by the sentencing judge. 402 F. 2d at 613.[2]

An analysis of the functions of the exclusionary rule is equally appropriate here. Its primary function "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Mapp* v. *Ohio, supra* at 656 (quoting from *Elkins* v. *United States,* 364 U.S. 206, 217 (1960)). Here the District Court concluded that the exclusionary rule *would* in all likelihood deter unconstitutional methods of law enforcement. The factual pattern reflects what can occur without an exclusionary rule. A police officer subjects a probationer (or parolee) to a lawless intrusion of his privacy. If he discovers evidence which is subsequently suppressed in the criminal prosecution, then the person can always be sent to prison for violating the conditions of probation or parole. The police have something to gain and nothing to lose. This is particularly so when the officer knows that the object of the search is on probation or parole:

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[2] *Verdugo* was distinguished in *United States* v. *Schipani,* 315 F. Supp. 253 (E.D.N.Y. 1970) on the ground that the search was intended to uncover inculpatory evidence in order to affect the sentencing. Here, the petitioner was subjected to a totally unjustified street search, three weeks after he was placed on probation, conducted by the same arresting officer. The inference of the type of intent found in *Verdugo* is most compelling.

> If the fruits of the search could be used to enhance the sentence, the possibility that the evidence might be excluded at trial would be of little importance in view of the untainted evidence available to establish [the initial offense]. Unless the evidence were unavailable for sentence as well as conviction, the agents had nothing to lose by risking an unlawful search: if the motion to suppress were denied, Verdugo could be convicted of an additional offense; if it were granted, the sentence on the original charge could still be enhanced. *Verdugo* v. *United States, supra* at 612.

The other purpose of the exclusionary rule is "the imperative of judicial integrity." See *Elkins* v. *United States, supra; Mapp* v. *Ohio, supra; Harrison* v. *United States,* 392 U.S. 219, 224, n. 10 (1968). The concept is that the government must observe its own laws, that it is "the omnipresent teacher". *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (dissenting opinion). The court below felt that the rehabilitative purposes of the probation system outweighed the added deterrent which would result from imposition of the exclusionary rule. Yet what could be less productive of rehabilitation than subjecting a probationer to a lawless search and then allowing its fruits to be the sole basis for incarcerating him,

> Indeed, the condonation of government lawlessness is conceivably even less acceptable in parole proceedings than in criminal trials; the rehabilitative foundations of the entire parole system can be completely undermined when a parolee observes his teacher, the government, violate the law with apparent immunity.

In Re Martinez, supra at 743 (dissenting opinion). See also, *In Re Gault,* 387 U.S. 1, 26-31 (1967); Comment, *Extending Search-and-Seizure Protection to Parolees in California,* 22 Stan. L. Rev. 129 (1969); Note, 45 N.Y.U.L.Rev. 1111, 1115 (1970).

Thus, both essential purposes of the exclusionary rule—deterrence of illegal police conduct and the imperative of judicial integrity—will be furthered if the rule is applied to probation revocation proceedings.

Finally, it is too late in our constitutional history to allow "unbridled discretion, however benevolently motivated, . . . [to] substitute for principle and procedure." *In Re Gault, supra* at 18. Increasingly courts have begun to hold, following the principles enunciated in *Mempa* v. *Rhay, supra,* that the decision to revoke probation or parole is sufficiently crucial to require that fair procedures be afforded. See, *e.g., Ashworth* v. *United States,* 391 F. 2d 245 (6th Cir. 1968) (counsel at probation revocation); *Hewett* v. *State of North Carolina, supra* (same); *Hahn* v. *Burke, supra; People ex rel. Menechino* v. *Warden,* 27 N.Y. 2d 376, 318 N.Y.S. 2d 449 (1971), *contra, Morrisey* v. *Brewer,* —— F. 2d ——, 39 Law Week 2624 (8th Cir., 5/11/71). But affording a hearing or counsel is a hollow gesture if illegally obtained evidence can then be the sole basis for depriving a man of his freedom.

The issue in this case affects the hundreds of thousands of probationers and parolees in the United States. If our society is serious about educating those individuals to respect its laws, then society must set the example.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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May 18, 1971

APPENDIX

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Miscellaneous No. 1750

Section "E"

U. S. *Ex rel.* JESSIE S. LOMBARDINO,

Petitioner,

—versus—

LOUIS A. HEYD, JR., Criminal Sheriff,

Respondent.

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CASSIBRY, *District Judge*:

Petitioner, Jesse S. Lombardino, asks this court to release him from state custody by writ of habeas corpus on the ground that he is being held in violation of the Constitution. The contentions made here have been previously presented to and rejected by the Criminal District Court for the Parish of Orleans and the Louisiana Supreme Court. The petition is therefore properly before this court. 28 U.S.C. §§2241(c)(3), 2254.

On February 16, 1970, Lombardino was convicted in state court of two counts of attempted simple burglary following the entry of pleas of guilty. He was sentenced to serve eighteen months on each count, the sentences to run concurrently. Execution of the sentences was suspended and petitioner was placed on active probation for a period of three years. As one of the conditions of his probation, petitioner agreed to

> "Refrain from the violation of any law of Louisiana, or of any other State, or of the District of Columbia, or of the United States; and to refrain from the violation of any Ordinance of any political subdivision of the State of Louisiana; . . ."

On March 8, 1970, Lombardino was stopped and frisked without a warrant by a policeman who had been an arresting officer on petitioner's burglary charge. The officer had neither reasonable grounds for suspicion that Lombardino was armed nor probable cause for arrest. In the search of petitioner's person, the officer found a tin of marijuana. A hearing on a motion to suppress was held on April 20, 1970, and the marijuana was ordered suppressed when the judge determined that the search had

been made in violation of petitioner's constitutional rights. The charge of possession of marijuana was subsequently dropped by the state.

While the possession charge was still pending, however, the Probation and Parole Division of the Louisiana Department of Corrections placed a detainer against Lombardino for violation of his probation. Petitioner has since been held in Orleans Parish Prison.

Pursuant to Article 900, Louisiana Code of Criminal Procedure, a hearing was conducted on June 2, 1970, to determine whether Lombardino had violated the conditions of his probation. The state judge presiding at the revocation hearing was the same one who had placed petitioner on probation and who had suppressed the marijuana in connection with the possession charge. After hearing the probation officer's testimony that Lombardino had been found in possession of marijuana, the judge concluded that petitioner had violated a condition of his probation and ordered the probation revoked.

I.

Lombardino's principal contention is that revocation of his probation upon the basis of illegally seized evidence violated his right to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments. Petitioner thus invites this court to extend the Fourth Amendment exclusionary rule[1] to probation revocation hearings. I decline the invitation at this time.

---

[1] The exclusionary concept as applied in criminal proceedings is set forth in *Weeks* v. *United States*, 232 U.S. 383, 392, 393 (1914); *Elkins* v. *United States*, 364 U.S. 206, 217 (1960); *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961).

I have no hesitation in stating that probationers are entitled to basic constitutional rights, including protection from illegal searches and seizures. *Brown* v. *Kearney,* 355 F.2d 199, 200 (5th Cir. 1966); *United States* v. *Hallman,* 365 F.2d 289, 291 (3d Cir. 1966); cf. *Martin* v. *United States,* 183 F.2d 436, 439 (4th Cir. 1950). The crux of the question posed here, however, is the *extent* of such rights. "[T]he federal constitutional rights of an accused in a criminal prosecution and the rights of an offender in proceedings on revocation of conditional liberty under parole or probation are not coextensive." *Brown* v. *Warden,* 351 F.2d 564, 567 (7th Cir. 1965).

In this case, Lombardino *was* afforded protection from the unlawful search and seizure when the marijuana was suppressed and the possession charge dropped. Lombardino's right to be free from "unreasonable searches and seizures" [2] was recognized to this extent.

Petitioner has been unable to cite any reported cases in which evidence was held inadmissible in probation or parole revocation proceedings on the ground that it was illegally obtained. The court has likewise been unsuccessful in searching for such authority. On the other hand, there are at least two reported decisions which have held illegally seized evidence admissible in parole revocation hearings. *Sperling* v. *Fitzpatrick,* 426 F.2d 1161 (2d Cir. 1970); *In re Martinez,* 463 P.2d 734 (Calif. Sup. Ct. 1970).[3]

[2] Fourth Amendment, United States Constitution.

[3] Also see *Grogan* v. *United States,* 262 F.2d 78 (5th Cir. 1959). In *Grogan* the District Court revoked probation based upon evidence obtained by federal officers in a search of defendant's truck. The Court considered the evidence on the ground that the search was legal and on the alternative ground that the evidence could be considered even though the search was illegal. The Fifth Circuit upheld the legality of the search in another action and found it

Chief Judge Lumbard, concurring in *Sperling,* explained why the exclusionary rule should not be extended to parole revocation hearings at this time:

> "To apply the exclusionary rule in the context of parole revocation hearings at the present time would merely exacerbate the problems [inherent in the rehabilitative function of the probation system]; to import fourth amendment suppression law into this process would in fact be counterproductive. Parole officers would be forced to spend more of their time personally gathering admissible proof concerning these parolees who cannot or will not accept rehabilitation. Time devoted to such field work necessarily detracts from time available to encourage those parolees with a sincere desire to avoid the all-too-familiar cycle of recidivism. An even greater potential loss would be in the time available to counsel and supervise—particularly in the early months—those who leave confinement with the question of rehabilitation in real doubt.
>
> "Although I am somewhat skeptical about the effectiveness of 'other remedies' to deter police misconduct, I must agree . . . that a double application of the exclusionary rule is not warranted at the present time. I draw this conclusion by balancing the interests of all parolees in securing administration of the parole system which is as nearly consonant with its dual goals as is possible at present levels of staffing and funding against the interest of individual parolees

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unnecessary to answer defendant's contention that the District Court had considered illegally seized evidence in the revocation hearing.

like Sperling in not being subjected to a search by local police officers which the government seems to concede was unconstitutional under traditional standards. *The time may come when the balance will shift. Proof of widespread police harassment of parolees would cause such a shift since the exclusionary rule is a deterrent which should be used when the need for deterrence is clearly shown.* But on the facts of the present situation, I am unwilling to strike a balance which could achieve little, other than a distortion of the priorities of the parole system." 426 F.2d at 1165, 1166. (Emphasis added.)

While Judge Lumbard was speaking "in the context of parole revocation hearings," what he said also holds true for probation revocation hearings.

Expansion of the exclusionary rule to probation revocation hearings would in all likelihood further its laudable purpose of deterring unconstitutional methods of law enforcement.[4] But the good to be obtained from such expansion must be balanced against the harm which will result due to the unique nature and purpose of the probation revocation hearing.[4A] If the rehabilitative function of the probation system is to be fostered, it seems imperative that the judge charged with the responsibility and discretion to grant, deny or revoke probation be fully aware of all the facts and circumstances in a particular case. This is especially so where, as here, there has been no evidence of police harassment of probationers. As Judge Lumbard has said, "[t]he time may come when the balance will shift", but this is not that time.

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[4] See cases cited in footnote 1, *supra*.

[4A] See *In re Martinez*, 463 P.2d 734, 740 (Calif. Sup. Ct. 1970).

II.

Lombardino also urges that revocation of probation because of mere arrest, without more, is a denial of due process. The point may be well taken, but it is not germane to this case. Perusal of Lombardino's "Conditions of Probation"[5] lays bare the flaw in this contention. Petitioner agreed to "refrain from the *violation* of any law . . ." (Emphasis added.) Merely being arrested would not be a breach of this condition; there must be an actual violation of law or commission of an offense. I find no denial of due process in such a condition of probation. Lombardino's probation was revoked not because he was arrested, but because he breached a condition of his probation, i.e., he violated a law.

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[5] The conditions of probation to which Lombardino agreed were:

"(1) Meet all your family responsibilities under the laws of Louisiana;

(2) Report to the probation officer as directed by said officer;

(3) Permit the probation officer to visit you at your home or elsewhere;

(4) Devote yourself to an employment or occupation approved by the probation officer;

(5) Refrain from owning or possessing any firearm or dangerous weapon unless granted written permission by your probation officer;

(6) Refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;

(7) Remain within the jurisdiction of this Court unless written permission to do otherwise is given by this Court or the probation officer;

(8) Notify the probation officer or this Court of any change in your address or employment;

(9) Refrain from the violation of any law of Louisiana, or of any other State, or of the District of Columbia, or of the United States; and to refrain from the violation of any Ordinance of any political subdivision of the State of Louisiana; . . ."

III.

Finally, Lombardino argues that Article 901, Louisiana Code of Criminal Procedure, requires a conviction before probation can be revoked. Since the state court was without authority to revoke his probation in the absence of a conviction, Lombardino contends its action constituted arbitrary state action in violation of the due process clause of the Fourteenth Amendment. This proposition is clearly without merit. Article 901 provides that "[w]hen a defendant who is on probation for a felony commits and is convicted of a felony . . . . his probation may be revoked as of the date of the final conviction of the felony." This provision is obviously not intended to restrict or limit the authority of the trial court, to "impose any specific conditions reasonably related to [the defendant's] rehabilitation . . ." Article 895, La. Code of Cr. Proc. It seems patent that Article 901 is meant to give the court power to revoke a probation upon conviction of a felony even in the absence of a specific condition of probation to that effect.[6]

IV.

A probation revocation hearing is not an adversarial proceeding; it is neither a civil action nor a criminal prosecution. *Heyser* v. *Reed,* 318 F.2d 225 (D.C. Cir. 1963). Rather, it is administrative in nature and "is concerned not only with protecting society, but also, and most importantly, with rehabilitating and restoring to useful lives those placed [on probation]. *Sperling* v. *Fitzpatrick, supra,*

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[6] Also see *Shaw* v. *Henderson,* —— F.2d —— (5th Cir. 1970), [No. 28652, July 2, 1970] footnote 3: "A conviction is not a Louisiana or a constitutional prerequisite to revocation [of probation]."

426 F.2d at 1163. Revocation of probation is within the discretion of the trial judge; he need only be "reasonably satisfied" that the probationer has violated a condition of his release. *United States* v. *Cates,* 402 F.2d 473, 474 (4th Cir. 1968); *Seymore* v. *Beto,* 383 F.2d 384 (5th Cir. 1967); *Yates* v. *United States,* 308 F.2d 737, 739 (10th Cir. 1962); *Manning* v. *United States,* 161 F.2d 827, 829 (5th Cir. 1947). Lombardino was given a full hearing before his probation was revoked. He was represented by able counsel of his own choosing and was given the opportunity to cross-examine and present evidence in his behalf. He did not deny that he had violated a condition of his probation. I find no abuse of the state trial judge's discretion in this case.

The petition for a writ of habeas corpus is therefore DISMISSED.

September 24, 1970, New Orleans, Louisiana.

FRED J. CASSIBRY
United States District Judge

Opinion of the United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30871

Summary Calendar*

JESSIE S. LOMBARDINO,

Petitioner-Appellant,

—versus—

LOUIS A. HEYD, JR., Criminal Sheriff,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(February 17, 1971)

Before:

GEWIN, GOLDBERG and DYER,

Circuit Judges.

PER CURIAM:

The appellant seeks a reversal of the judgment of the district court denying his petition seeking release from

* Rule 18, 5th Cir. See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5th Cir. 1970, 431 F.2d 409, Part I.

state custody by writ of habeas corpus. We have carefully considered the record and the contentions of the appellant and perceive no error in the judgment of the district court. —— F. Supp. —— (E.D. La. 1970). Accordingly, the judgment is AFFIRMED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-179

JESSE S. LOMBARDINO,

Petitioner,

versus

LOUIS A. HEYD, JR., Criminal Sheriff,

Respondent.

On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Louis A. Heyd, Jr., prays that the judgment rendered by the United States Court of Appeals for the Fifth Circuit, affirming the judgment of the United States District Court for the Eastern District of Louisiana, dismissing petitioner's application for a writ of habeas corpus, be affirmed and that petitioner's application requesting the issuance of a writ of certiorari be denied.

QUESTIONS PRESENTED

The following questions are presented for consideration by this Honorable Court:

1. Is an application for habeas corpus, directed to alleged errors in a probation proceeding and not attacking the conviction itself, rendered moot by the subsequent release of petitioner from incarceration?

2. Is evidence seized without probable cause and without a search warrant admissible in a proceeding to revoke probation?

ARGUMENT

QUESTION 1: IS AN APPLICATION FOR HABEAS CORPUS, DIRECTED TO ALLEGED ERRORS IN A PROBATION PROCEEDING AND NOT ATTACKING THE CONVICTION ITSELF, RENDERED MOOT BY THE SUBSEQUENT RELEASE OF PETITIONER FROM INCARCERATION?

It is submitted that the instant cause is moot by virtue of the fact that petitioner recently was released on parole, which fact is admitted by petitioner in footnote 1 on page 4 of his petition for certiorari. Were the instant case concerned with a criminal conviction, the blot on petitioner's character would be sufficient to justify laying aside traditional notions of finality so as to warrant review even after termination of the imprisonment. However, petitioner's underlying criminal convictions are not at issue in the instant case.

Petitioner has failed to allege any possible adverse legal consequences that could continue to flow even after termination of the incarceration from a mere revocation of probation in Louisiana.

The cases of *Sibron* v. *New York*, 392 U.S. 40 (1968), and *Carafas* v. *LaVallee*, 391 U.S. 234 (1968), cited by petitioner, are inapplicable since there the stigma of conviction was involved. Here, the underlying convictions are unchallenged and will remain on petitioner's record regardless of the outcome of this case. The Supreme Court of the United States has not yet decided whether mere gossamer speculation of adverse consequences, not even alleged by petitioner, is sufficient to remove a case such as this from the doctrine of mootness.

Respondent suggests that the instant petition should be dismissed as moot.

QUESTION 2: IS EVIDENCE SEIZED WITHOUT PROBABLE CAUSE AND WITHOUT A SEARCH WARRANT ADMISSIBLE IN A PROCEEDING TO REVOKE PROBATION?

Respondent suggests that the Fourth Amendment exclusionary rule should not be extended to probation revocation hearings. Professor White summarizes the present state of the law:

> "Evidence obtained through an unlawful search of a parolee may be used either in a criminal trial at which a new charge is brought or in a proceeding to revoke parole. While a defendant facing a new charge will have the opportunity to exclude evidence seized in violation of the fourth amendment, a defendant facing parole revocation will probably be powerless to effect this remedy."

W. S. White, *The Fourth Amendment Rights of Parolees and Probationers,* 31 U. Pitt. L. Rev. 167, 199-200 (1969) (footnotes omitted).

Respondent agrees with petitioner that probationers are entitled to certain basic constitutional rights, including protection from illegal searches and seizures. This constitutional guarantee was followed very strictly in the case of Jesse S. Lombardino, since the trial court suppressed the evidence in question by holding that the search and seizure were illegal. However, as was found by each of the courts below, the fact that probationers are entitled to basic constitutional rights, including protection from illegal searches and seizures, does not preclude a state from revoking the probation of a defendant upon a clear showing that he has violated one of the conditions of his probation.

Petitioner relies on the case of *Mempa* v. *Rhay,* 389 U.S. 128 (1967). That case is distinguishable. In *Mempa,* the actual *sentencing* was deferred. In the instant case, the judge imposed a determinate sentence of incarceration at the time of trial. The court then suspended its sentence and placed the defendant on probation for a determinate period. The sentencing was not deferred.

Probation is not a right guaranteed to any defendant by the United States Constitution. In a sense, it is a gratuity that the defendant receives under the philosophy that rehabilitation may accomplish more for society than incarceration. However, this gratuity of necessity must carry with it certain terms and conditions

for the benefit of the probationer himself and for the protection of his fellow citizens.

In the case of *Escoe* v. *Zerbst*, this Honorable Court said:

> "Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose."
>
> *Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935).

In the case of *Lanza* v. *New York*, 370 U.S. 139, 142-44 (1962), this Honorable Court held that the Fourth Amendment does not guarantee privacy to prisoners in jail. In the instant case, petitioner merely has been allowed to serve his sentence on the street rather than in a jail cell. There is no contention that the petitioner at bar was the object of police harassment.

Apposite is the logic of Justice Friedman of the California Court of Appeals:

> "Inmates of state prisons do not have the usual array of federal and state constitutional rights guaranteed to nonincarcerated citizens. ... Prison authorities may subject inmates to intense surveillance and search unimpeded by Fourth Amendment barriers. ... Although a parolee is not a prison inmate in the physical sense, he is constructively a prisoner under legal custody of the State Department of Cor-

> rections and may be returned to the prison walls without notice and hearing."
>
> *People* v. *Hernandez,* 229 Cal.App.2d 143, 40 Cal.Rptr. 100, 103 (Cal. App. 3d Dist., 1964), *cert. denied,* 381 U.S. 953 (1965) (citations omitted).

In *Coolidge* v. *New Hampshire,* this Honorable Court laid down in general terms certain guidelines for application of the Fourth Amendment exclusionary rule. Wrote Justice Stewart:

> "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption * * * that the exigencies of the situation make that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.' "
>
> *Coolidge* v. *New Hampshire,* 91 S.Ct. 2022, 2032 (June 21, 1971) (footnotes omitted).

Anent "exigencies" *see also Warden* v. *Hayden,* 387 U.S. 294 (1967); *McDonald* v. *United States,* 335 U.S. 451 (1948).

In the instant case, respondent respectfully suggests that the exigency of making available corrective assistanee render it imperative that the Fourth Amendment exclusionary rule not be extended to revocation proceedings. In the instant case, unlike *Coolidge*, the exigencies are not those presented by imminent possibility of a suspect's flight. Rather, the exigency is the administrative difficulty of clothing rehabilitative efforts with all the burdens of formal legal proceedings. Respondent suggests that to convert penologists into policemen well may spell the death of rehabilitation in America.

Chief Judge Lumbard of the Second Circuit expressed this point in his concurring opinion in *United States* v. *Fitzpatrick:*

> "As with other procedures in the correctional segment of the criminal justice system, the parole offices are overworked and inadequately funded.
>
> "The result is that both the rehabilitative and protective functions suffer from the inattention to individual parolees which must follow from a heavy caseload. ...
>
> "... To apply the exclusionary rule in the context of parole revocation hearings at the present time would merely exacerbate the problems discussed above; to import fourth amendment suppression law into this process would in fact be counterproductive. Parole officers would be forced to spend more of their time personally gathering admissible proof concerning those parolees who cannot or will

not accept rehabilitation. Time devoted to such field work necessarily detracts from time available to encourage those parolees with a sincere desire to avoid the all-too-familiar cycle of recidivism. An even greater potential loss would be in the time available to counsel and supervise — particularly in the early months — those who leave confinement with the question of rehabilitation in real doubt."

United States v. *Fitzpatrick*, 426 F.2d 1161, 1164-65 (2d Cir. 1970) (footnote omitted) (concurring opinion).

In the majority opinion in *United States* v. *Fitzpatrick*, Circuit Judge Hays said:

"Appellant contends that the Board of Parole could not use the fruits of an unlawful search and seizure as evidence to prove a violation of parole. We cannot accede to this contention and affirm the denial of appellant's petition for a writ of habeas corpus on the ground that the exclusionary rule is not applicable in a parole revocation proceeding. . . .

". . . A parole revocation proceeding is concerned not only with protecting society, but also, and most importantly, with rehabilitating and restoring to useful lives those placed in the custody of the Parole Board. To apply the exclusionary rule to parole revocation proceedings would tend to obstruct the parole system in accomplishing its remedial purposes."

United States v. *Fitzpatrick*, 426 F.2d 1161, 1163-64 (2d Cir. 1970) (footnote omitted).

See also In re Tucker, 95 Cal.Rptr. 761, 486 P.2d 657 (Cal., June 24, 1971), and the cases cited therein at 95 Cal.Rptr. 761, 764, 486 P.2d at 660.

In the instant situation, Louisiana's problem is compounded by the fact that its Legislature chose to give probationers the right to have their revocation hearing held in open court rather than before a board. Clearly Louisiana did not have to accord probationers this right. *Burns* v. *United States*, 287 U.S. 216 (1932); *Hyser* v. *Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). But Louisiana has done so. Petitioner now would have this Court tell our nation's overworked trial judges, whose dockets already are clogged to capacity, that they can save time by *not* being merciful, that they can get home sooner by *not* meting out sentences of probation, that they simply should sentence offenders to the penitentiary the first time around.

Obviously, trial judges should be encouraged to sentence defendants to probation rather than to prison. But judges are human. In states such as Louisiana, where revocation of probation requires an in-court hearing rather than a hearing before an administrative agency, it is essential that the overworked judges realize at the outset, when they initially impose sentence, that if efforts at rehabilitation fail it will be a simple matter to remand the defendant to prison with only a brief adversary hearing.

The cause of rehabilitation will suffer a serious setback indeed if petitioner in the instant case succeeds in hamstringing the revocation process. Trial judges then will have increased subconscious incentive to clear their dockets by reverting to the easy practice of sentencing defendants to the penitentiary, forgetting them, obviating the unpleasant prospect of having to meet the same defendants again in sticky and time-consuming revocation proceedings clothed in full and formal evidentiary dress.

In his concurring opinion in *Coolidge* v. *New Hampshire*, Justice Harlan wrote:

> "[I]n order to leave some room for the States to cope with their own diverse problems, there has been generated a tendency to relax federal requirements under the Fourth Amendment, which now govern state procedures as well."
>
> *Coolidge* v. *New Hampshire*, 91 S.Ct. 2022, 2050 (June 21, 1971) (concurring opinion).

In the case at bar, the State of Louisiana does not ask that federal requirements be relaxed. Rather, it is the petitioner who asks that federal requirements under the Fourth Amendment exclusionary rule be now *extended* to new areas. Petitioner in the instant case, reasoning by analogy to an automobile, would have this Court transform and elevate judicial mercy to the level of a vested right. Probation, of course, cannot be likened to an automobile, for an automobile is incapable of rehabilitation and most unsuited for

incarceration. Evidently petitioner in the instant case no longer likes the terms of the probation that he so eagerly agreed to earlier. He now asks this Honorable Court to deprive *all* criminal defendants of their freedom to agree to similar terms of probation, including evidentiary rules for revocation of probation.

Respondent suggests that the instant petition should be dismissed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Maurice R. Franks, counsel for Louis A. Heyd, Jr., Criminal Sheriff, respondent herein, hereby certify that I have this day served a copy of the foregoing Brief for Respondent in Opposition upon the following counsel for petitioner, by depositing a copy of same in the United States mails, first class postage prepaid, in a sealed envelope addressed to: Hon. Melvin L. Wulf, American Civil Liberties Union Foundation, 156 Fifth Avenue, New York, New York 10010.

This is the __ day of _____, 1971, at New Orleans, Louisiana.

_____

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State of Louisiana]
: ss.
Parish of Orleans]

Subscribed and sworn before me, this ___ day of _____, 1971, at New Orleans, Louisiana.

_____

NOTARY PUBLIC

In the

Supreme Court of the United States

October Term, 1970

No. 70-179

Jesse S. Lombardino,

Petitioner,

—v.—

Louis A. Heyd, Jr., Criminal Sheriff,

Respondent.

On petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY MEMORANDUM FOR PETITIONER

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IN THE

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OCTOBER TERM, 1970

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

This reply memorandum is addressed solely to the question of mootness raised in the respondent's brief in opposition. While the petitioner adverted to this issue in the *certiorari* petition at page 4, footnote 1, we would elaborate on that discussion.[1]

As a consequence of the revocation of probation, the petitioner was incarcerated when he filed his habeas corpus application in the District Court. State remedies had already been exhausted. He remained in confinement dur-

[1] The respondent's arguments on the substantive issue—whether evidence seized in violation of the Fourth Amendment is admissible in a probation revocation proceeding—were anticipated in the original petition.

ing and following his appeal to the Fifth Circuit. He was released on parole shortly before the filing of the petition for *certiorari*. The question then is whether release from confinement pending review in this Court renders moot petitioner's challenge to the revocation of probation which caused that confinement.

In parallel situations, this Court has held that so long as there is even a "mere possibility" that adverse legal consequences will flow from a conviction, the case is not rendered moot. See *Sibron* v. *New York*, 392 U.S. 40 (1968); *Carafas* v. *La Vallee*, 391 U.S. 234 (1968). Lower courts have applied this principle to allow other challenges to probation revocation proceedings even though the petitioner had been released from confinement during the federal habeas corpus action. The Fourth Circuit, in *Hewett* v. *State of North Carolina*, 415 F.2d 1316 (1969) heard challenges to probation revocation proceedings, on the ground that the right to counsel had been denied, even though both petitioners were no longer confined. Reasoning from *Sibron* and *Carafas*, the court found two sets of possible adverse legal consequences which lingered after confinement. First, revocation of probation affected the time when the petitioners could seek restoration of civil rights under North Carolina law. Second, if the petitioners were subsequently convicted, the sentencing judge "would be bound to be influenced by that petitioner's prior probationary experience." 415 F.2d at 1322. The identical situation was considered by the Seventh Circuit in *Hahn* v. *Burke*, 430 F.2d 100 (1970), *cert. denied*, 28 L. Ed.2d 868 (1971). Confinement had terminated, but the challenge to the probation revocation was held not to be moot:

> The probation revocation affixes a permanent blemish to petitioner's record. If petitioner ever has future difficulties with the law in Wisconsin, the judge could take into account the fact that petitioner's probationary status was at one time revoked. 430 F.2d at 102.

Accord, Scarpelli v. *Gagnon,* 317 F. Supp. 72 (E.D. Wis. 1970). Petitioner submits that these decisions correctly apply the policies identified in *Sibron* and *Carafas* and support the argument that the case is not moot.

Respectfully submitted,

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